NO. 10972

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE CLAYTON, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the District Court of the United States for the Eastern District of Washington

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BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

The appellant, George Clayton, was charged jointly with the defendants, Wilma Shirley Doores and Edward Kelly, with conspiracy to extort money and narcotic drugs from one, Dr. E. H. Teed, a practicing physician of Coeur d'Alene, Idaho, through the imeprsonation of a Federal narcotic officer in violation of Sections 76 and 88, Title 18, U.S.C.A. as set forth in Count I of the indictment, the charging part of which is as follows:

> "That WILMA SHIRLEY DOORES, EDWARD WILLIAM KELLY, and GEORGE CLAYTON, in Spokane County and within the

jurisdiction of the Northern Division of the United States District Court for the Eastern District of Washington, commencing some time shortly prior to April 9, 1944, the exact date being to the Grand Jurors unknown, and continuing thereafter to on or about May 25, 1944, did willfully, unlawfully and feloniously conspire, combine, confederate and agree together, and each with the other and each with diverse other persons to the Grand Jurors unknown, to commit crimes and offenses against the United States as follows, to-wit: To violate Title 18, Section 76, U.S.C.A. in the following manner and by the following means:

"That the said defendants did conspire, combine and agree that the defendant EDWARD WILLIAM KELLY, with intent on the part of each of said defendants to defraud one Dr. E. H. Teed of Coeur d'Alene, Idaho, a practicing physician of that city, of money and narcotic drugs, would falsely assume and pretend to be an officer acting under the authority of the United States, to-wit, an inspector and officer of the Narcotics Division of the United States of America, and that the said defendant EDWARD WILLIAM KELLY would take upon himself to falsely act as such inspector and officer of the Narcotics Division of the Treasury Department of the United States of America, and in such pretended character as such officer would threaten to arrest the said Dr. E. H. Teed for unlawfully disposing of narcotic drugs, which the defendant, WILMA SHIRLEY DOORES, would induce the said Dr. E. H. Teed to unlawfully sell and dispose of to her, the said money and narcotic drugs so to be fraudulently obtained from the said Dr. E. H. Teed were intended by said defendants to be secured from the said D. E. H. Teed by the said defendant WILMA SHIRLEY DOORES in consideration

of the said EDWARD WILLIAM KELLY while acting in his pretended capacity as a narcotics agent of the Treasury Department of the United States, failing to arrest, apprehend or institute prosecution against the said Dr. E. H. Teed for unlawfully selling and disposing of narcotics to the said defendant WILMA SHIRLEY DOORES."

The indictment contained four other counts, none of which involved the appellant, George Clayton. Defendants Wilma Shirley Doores and Edward Kelly, entered pleas of guilty to the conspiracy count and to the other substantive counts not involved in this appeal. Neither defendants Doores nor Kelly had been sentenced at the time of the trial. The trial resulted in the verdict of guilty on the conspiracy count as to George Clayton.

The evidence produced at the trial established that on April 9, 1944, Clayton, Kelly, Wilma Shirley Doores, and Wesley Doores, a brother of Shirley met at the home of George Clayton and Shirley Doores at E. 7225 Carlisle Avenue in the City of Spokane. This residence was jointly occupied by George Clayton and Shirley Doores. The evidence indicated that George Clayton and Shirley Doores had lived together approximately five years under a so-called common law husband and wife relationship, and were residing at the above residence in that relationship at the time of the meeting.

On April 9, 1944, at said residence, the four individuals mentioned above discussed the plans and

the means for the extortion of money and narcotic drugs from Dr. E. H. Teed, a practicing physician at Coeur d'Alene, Idaho. It was there agreed that Edward Kelly would impersonate a W. J. Graben, a Federal narcotics agent, stationed at Seattle, Washington.

The evidence also disclosed that prior to the time of this meeting Shirley Doores had on a number of occasions secured narcotic drugs from Dr. Teed for a fictitious individual referred to as Mike Sanders, and it was the general plan that Edward Kelly, posing as a narcotics officer, would journey to Coeur d'Alene, Idaho, and advise Dr. Teed that he was checking upon the prescriptions issued to Mike Sanders. Accordingly on the morning following this meeting, to-wit, April 10, 1944, Shirley Doores and Edward Kelly went to Coeur d'Alene, where they separated. Shirley went first to the Doctor's office and after a delay of approximately 10 minutes Edward Kelly followed her there. He sat in the outer office until Shirley and the doctor came out of the doctor's private office, whereupon Kelly made known to Dr. Teed that he was W. J. Graben, a Federal Narcotics Officer, and was investigating the sale of narcotics to the above-mentioned Mike Sanders.

In carrying out his scheme of impersonation, he demanded of Dr. Teed that he be advised who Mike Sanders was and where he could be located. He further acquainted the doctor with the fact that he had already spoken to Mike Sanders and that Sanders

had advised him that at no time had he secured prescriptions for narcotics from Dr. Teed. The doctor was also advised that Kelly had a warrant for the doctor's arrest in his pocket, which he indicated he might have to serve on the doctor at a later time.

Kelly left the doctor's office thereafter and immediately returned to Spokane. Shirley Doores returned to the doctor's office later that same day, and stated to Dr. Teed that she had talked to Graben and that Graben could be fixed for $2500. Dr. Teed paid this sum that same day to Shirley Doores.

Upon Shirley Doore's return to Spokane she met Clayton, Kelly and Wesley Doores at Moore's Card Room where Clayton had been running card games for more than a year. She announced that she had received the sum of $300 from Dr. Teed. She gave $100 of this sum to Kelly and $80 to her brother, Wesley Doores. On April 11, 1944, Shirley Doores again contacted Dr. Teed and demanded $1500 more, which she said was necessary to pay off another narcotics agent and the clerk in the narcotics office. She also demanded a quantity of narcotics. At this time Dr. Teed paid her the $1500 and gave her 100 tablets of morphine, 50 grains of codein and 100 tablets of dilaudid, as requested.

On April 12, 1944, she again reappeared at Dr. Teed's office at Coeur d'Alene and demanded $3500 more to pay off some of the other narcotics agents in that territory. Dr. Teed paid her this amount. She suggested to Dr. Teed at this time that he leave town

for at least several days to permit conditions to quiet down, and the doctor informed her he would go to Hailey, Idaho, and gave Shirley his address there.

On April 20, 1944, Dr. Teed received a telegram at Hailey, Idaho, from Shirley Doores requesting him to call a Spokane telephone number and ask for Shirley Doores or Shirley Clayton. He put in the call, and was told by Shirley that he should come to Spokane as quickly as possible and straighten up what appeared to be very serious complications, and that if these matters were not straightened out before Saturday, April 22, he might be arrested. Dr. Teed immediately went to Spokane and saw Shirley on the morning of April 22 at the address submitted by her to him, to-wit, 7225 East Carlisle. Shirley, after making what she told Dr. Teed was a long distance telephone call to Seattle from a sandwich stand in the neighborhood, advised Dr. Teed that an additional sum of $6500 was required to hush a Mr. Bangs, Chief Narcotic Inspector in Seattle, together with a large amount of narcotics for Graben. Dr. Teed paid Shirley Doores $3000 in cash that evening and the balance of $3500 and the narcotics was given to Shirley on the Monday morning following, on April 24, 1944. Dr. Teed did not again see Kelly or Shirley until May 16, 1945.

In the meantime Shirley Doores, on Thursday, April 13, 1944, reported to Kelly that she had received an additional $300 from Dr. Teed and paid him $100 of that amount. Kelly suspected from in-

formation acquired on his own part and through Wesley Doores that Shirley Doores had received more than $600 from Dr. Teed, and accordingly on or about May 15 or 16 went to Dr. Teed's office in Coeur d'Alene where he was told by Dr. Teed that $14,000 had been paid by him to Shirley Doores. Kelly advised Dr. Teed that he had only received $200 of the amounts paid to Shirley Doores, and said he was going back to Spokane and straighten the matter up with her. He demanded $250 from Dr. Teed at this time, plus an additional amount of narcotic drugs. This sum, $250, together with the drugs was paid and delivered to Kelly that day and the next morning in Spokane in front of the Milwaukee depot, along with an additional $20 to compensate Kelly for what he termed "extra trouble".

Kelly, on his return to Spokane that afternoon, went directly to the residence jointly occupied by Shirley and George Clayton, where he accused Shirley Doores of having received $14,000 from Dr. Teed. Clayton was called into the conversation and made the statement of, "I don't know how much money she got." (R. 123). Shirley Doores insisted that $600 was all that she had received.

On or about the 25th day of May, Shirley Doores and Kelly again journeyed to Coeur d'Alene, Idaho, to see Dr. Teed, and the two were arrested at Dr. Teed's office on the afternoon of that same day, as a result of a call made to the Sheriff's office by Dr. Teed.

The evidence elicited at the trial showed that Clayton was the one who first suggested to Kelly that he impersonate a Federal Narcotics officer. (R. 141). Clayton first suggested to Wesley Doores that he act as a Federal Narcotics Officer and Wesley Doores refused (R. 138-139) because he was on parole. This occurred approximately three months prior to their meeting at the Clayton home where Kelly was first asked by Clayton to carry on the impersonation.

ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERRORS 1 AND 2

Both of these specifications of error will be answered together since they both entail a challenge to the sufficiency of the evidence upon which the verdict of guilty was based.

That the appellant, George Clayton, took an active part in the conspiracy alleged, is proven, first by the testimony of a co-conspirator, Edward William Kelly. Kelly testified at length on the stand that he had met George Clayton in Spokane in 1943 (R. 101). That on April 9, 1944, he attended a meeting at the residence of George Clayton and Shirley Doores at which meeting there was present George Clayton, Shirley Doores and Wesley Doores (R. 103). That in the course of the conversation with reference to the plans and means to extort money and narcotics from Dr. E. H. Teed of Coeur d'Alene, Clayton stated: "I think the best way is to go up there and throw a good scare into him" (R. 104). "Clayton was present, Shirley and Bunny (Wesley Doores) and myself were present when the plans were made and we all took some part in it." (R. 105). That in answer to the suggestion that Bunny impersonate the narcotics inspector he, Clayton, said: "Bunny would be no good in that kind of a deal because he thought Dr. Teed knew Bunny."

"The Court: Who knew Bunny?

A. Dr. Teed knew Bunny.

Q. (Mr. Connelly): That is the statement you say Clayton made?

A. Yes, sir." (R. 106).

George Clayton was present throughout the entire meeting (R. 108). Clayton was present with Shirley Doores and Kelly at Moore's Card Room immediately upon her return from the first contact with Dr. Teed on April 10, 1944. (R. 117). That the three of them sat together at the lunch counter and that Shirley gave an account of her success at her meeting with the doctor at Coeur d'Alene, and that Clayton was present at the entire conversation (R. 117 and 118).

That on or about May 16, 1944, Kelly spoke to both Clayton and Shirley Doores at their joint residence in Spokane where he had gone to exact an accounting with Shirley as to the $14,000 she had purportedly received from Dr. Teed. The following conversation was had between them (R. 124).

"Q. What conversation did you have with her at that time?

A. I told her I heard we were all going to be arrested that day.

Q. Was Clayton there?

A. Yes, sir; and I told him also.

Q. What did they say?

A. They couldn't believe it. They wanted to

know where I found it out, and I told them, and he suggested to Shirley we get in the car and go up to see Dr. Teed and find out if he had told the authorities, and she agreed to do it."

That Wesley Doores, who was not charged as a conspirator or in any of the substantive counts, testified as follows concerning the first joint meeting attended by Clayton, Shirley Doores, Edward William Kelly and Wesley Doores on April 9, 1944. (R. 140, 141 and 142):

"Q. Who else was at the house besides you and George Clayton and Kelly?

A. My sister Shirley was there.

Q. When you say 'George', do you mean the defendant, George Clayton?

A. Yes, sir.

Q. Tell us anything that George Clayton said out there with reference to this doctor at Coeur d'Alene during that evening at any time.

A. Well, after dinner out there, we was talking, and George said he had a good score at Coeur d'Alene if he could get one of us to go on it, and Kelly asked what it was, and George Clayton explained that Shirley had been getting prescriptions from Dr. Teed at Coeur d'Alene, and he had been writing them in a fictitious name, and if some one would impersonate a federal man he could take the doc for some money, and he wanted me to go over and I wouldn't go, and Kelly asked what he thought the doc would come up with, and he told him oh, $800 or $1000,

somewhere around there, I don't remember the exact amount, and Kelly asked him if he thought there would be any trouble, and George told him no, there wouldn't be any, and so Kelly agreed to go over there.

Q. What, if anything, was said by any of you as to how this transaction would be carried out and who said it, as you recall?

A. George went on to explain to Kelly at the same time after Kelly consented to go, he would drive him over, and Shirley was to go up to the doc's office and Kelly would come in a few minutes later, and Shirley would see Kelly and tell the doc that was a federal man in the waiting room.

Q. Was any name for the federal man used?

A. Graven, Mr. Graven, and that Kelly was supposed to tell the doc his name was Graven, and he was over there to check narcotic prescriptions, and it was pretty bad for the doc.

Q. Was your sister present at this conversation?

A. Yes, sir.

Q. Can you tell us whether or not the name Mike Sanders was used there?

A. That was one of the fictitious names she used.

Q. What?

A. That was one of the fictitious names the doctor had used in writing prescriptions.

Q. Did your sister talk about that name that night?

A. George and Shirley both talked about it.

Q. What was said about how much money they expected to get out of this man?

A. Then George said he thought the doc could be taken for $800 or $1000.

Q. Who asked him about that?

A. Kelly did.

Q. Was there anything further said there that you can recall at this time?

A. George said he would drive them over next morning, but after talking about it he decided against driving them over. He said, 'If there should be any trouble over there I wouldn't want my car to be seen over there.' "

That he saw both Shirley Doores and George Clayton several days after this meeting and that Clayton exhibited quite a few hundred dollars in a bill fold and said:

"That ain't all I have got. I have some of the little white tablets. He always referred to narcotics as little white tablets." (R. 148).

Several weeks thereafter George Clayton showed this witness what he said to be $6000 in cash and mentioned that he was going to Pasco to open a gambling joint (R. 149). That on or about the 17th or 18th of May, Kelly had stated to Wesley Doores

that he, Kelly, had ascertained from the doctor at Coeur d'Alene that George Clayton and Shirley Doores had been paid $14,000 and that he was going to demand his part of it. (R. 151). That several days later George Clayton personally called this witness on the phone and stated to him:

> " 'You and that other rat'—meaning Kelly—'better keep your mouth shut' and he said, 'If you know what is healthy for you you had better get out of town, or I will bury you at Walla Walla. You know you are on parole and it wouldn't be hard for me to do.' " (R. 152).

Erick R. Erickson, Assistant Cashier at the Old National Bank in Spokane testified that George T. Clayton maintained a checking account there (R. 272). That a deposit was made by George Clayton under date of April 12, 1944, for $1050 (R. 272), and a deposit of $2000 on May 1, 1944. (Plaintiff's exhibits 32 and 33—R. 64). Exhibit No. 31 (R. 63) indicates that between the period of March 27, 1944 and July 21, 1944 the said amounts of $1050 and $2000 respectively were the only amounts deposited by George Clayton in said account, with the exception of $89.00 deposited on June 15, 1944. (R. 63).

Nora McHargue, bookkeeper and teller, Spokane Valley State Bank, testified that on May 18, 1944, George Clayton made a final payment of $1251.48 in cash to that institution on a contract for the purchase of real estate hereinbefore described at E. 7225 Carlisle Avenue (R. 330 and 331).

George Heglar, used car manager for the Barton Automobile Company, Spokane, Washington, testified that on the 2nd day of May, 1944, Shirley Doores purchased an Oldsmobile automobile from his company for which she paid cash in the sum of $1644.10 (R. 357, 358).

Wayne Bezona, United States Marshal for the Eastern District of Washington, testified that on the 29th day of May, 1944, he removed the sum of $5950.00 in cash from the safe deposit box maintained at the Old National Bank in Spokane, Washington, by Shirley Doores under the name of Vera Wilson. (R. 385, 386).

The above amounts of cash approximate the $14,000 paid by Dr. Teed to Shirley Doores. The jury had a right to believe that these sums constituted a portion of the extortion money paid by Dr. Teed, and that they had a right to consider that these sums added together approximated the amount extorted from Dr. Teed.

It is a generally accepted rule as set forth fully in *Brickey vs. United States*, 123 F. (2nd) 341, and *West vs. United States*, 113 F. (2d) 68, that a conviction may be sustained by the uncorroborated testimony of an accomplice alone, although that testimony may be subject to close scrutiny and minute examination.

In the case at bar, not only do we have the testimony of an accomplice and co-conspirator, Edward

William Kelly, but we also have the testimony of Wesley Doores, not charged as a co-conspirator, but an accomplice, and many and varied items of circumstantial evidence tending thoroughly to corroborate the testimony of the co-conspirator, Edward William Kelly. We respectfully submit that the evidence as to this appellant is clear and convincing beyond all reasonable doubt, and was before the jury and considered upon correct instructions from the Court which were not excepted to by the appellant Clayton.

The appellant has alleged in his appeal that the evidence submitted was as consistent with innocence as with guilt, and therefore insufficient to sustain a conviction. Several cases are cited by him to prove the rule. We have no argument with the rule that if the evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the conviction. Such rule, however, cannot be applied in this particular set of facts, since the evidence submitted so overwhelmingly implicates the appellant as a conspirator that it is not capable of two interpretations.

ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERRORS 3 AND 4.

Appellant assigns as prejudicial error, the remarks of the United States Attorney in his closing statement to the effect that:

> "Shirley Doores will not lie for anyone. * * * You are dealing with the people of the underworld, don't forget that for a moment. * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this Court are fixed by the Court alone, District Attorneys are not even allowed to make recommendations as to penalties."

It is respectfully submitted that there was nothing inflamatory about the above remarks or in the manner of their utterance which bring it within the rule laid down by the United States Supreme Court in *Viereck v. United States*, 318 U. S. 236. At page 247 the Court stated:

> "In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice."

Passion and prejudice as used in the Opinion refer to those unusual emotions stirred by the bitterness occasioned by participation in World War II.

The rule is further enunciated in *Berger v. United States*, 295 U. S. 78. At page 89 the Court stated:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

It is well to note, however, that even though the intemperate and prejudicial remarks of the United States Attorney were considered by the Court to be of an extremely serious nature, the Supreme Court pointed out that the case against Berger was weak and that:

> "If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached."

Certainly the remarks of the District Attorney in that case far exceed in their prejudicial nature any of the remarks of the United States Attorney in the case at bar, and in addition we submit that the evidence as to the appellant here is strong and "overwhelming," as that word is used in the quotation cited above.

We believe that these statements come within the standard laid down in *Tatum v. United States*, 146 F. (2d) 406, a very recent decision of the Ninth Circuit and come within the boundaries of fair argument as indicated therein.

With reference to the statement of the United

States Attorney that Kelly was man enough to plead guilty and testify and there was nothing he could offer him, and that penalties of the Court were fixed by the Court alone—the District Attorney not being allowed to make recommendations as to penalties—we respectfully submit that this is nothing more than the statement of the practice instituted by Judge Schwellenbach in the District Court for the Eastern District of Washington, and as explained by him in his opinion. (R. 23).

Considered in their entirety, we submit that these comments do not constitute prejudicial error.

ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERROR NO. 5

Appellant contends that prejudicial error was committed when the Court permitted the District Attorney to argue to the jury over appellant's objection that the defendant had failed to call as a witness in his own behalf the co-defendant, namely, Shirley Doores, who had entered a plea of guilty prior to commencement of the trial, but upon whom judgment had not been passed.

The rule applicable here, it is respectfully submitted, is that if the party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States*, 150 U. S. 118.

The rule is well stated by Justice L. Hand in *United States v. Cotter*, 60 F. (2d) 689 (287 U. S. 666, certiorari denied) at 691 and 692:

> "When both sides fail to call a witness who knows something of the facts, their conduct, like anything else they do, is a circumstance which a jury may use. If both can call him and he is impartial, ordinarily it will have little weight; if it appear that he would naturally side with one party, it is reasonable to expect that he does not use him for good reason; and that is fair argument for the other. More so, if he is only available to one who alone knows the facts, and there is no other evidence on the issue."

In *Milton v. United States*, 110 F. (2d) 556, at 559, the case of *United States v. Cotter, Supra*, is cited with approval, stating:

> ". . . if the witness is available to the accused and not to the government and is informed concerning facts material to the case, the presumption arises from his unexplained absence that the accused had good reason for not calling him, and this may properly be argued against him."

In *Lowrey v. United States*, 128 F. (2d) 477, at 479 and 480, the point in issue was whether or not a Federal Officer of the Alcohol Tax Unit had an understanding with local police officers for alleged violation of liquor laws. A former policeman had testified that on the occasion of the acquittal of the defendant in a state court, one of the state officers had said in the presence of the Federal Officer: "We'll get him again for you," to which the Federal Officer replied: "All right". This agent was a witness for the Government in the trial of appellant where the question of the lawfulness of the seizure of the liquor was in issue. He was not called by the Government to deny the testimony of the witness. The Court, speaking through Judge Riddick, said:

> "It is also significant that the testimony of the witness Outler (former local officer) is not denied by the federal officer with whom the agreement is supposed to have been made. That officer was a witness for the government in the court below and, so far as the record goes, was available to refute Outler's testimony. This testimony was material for, if true, it required the suppression of the government's evidence. In

> such circumstances the unexplained failure of the government to place the witness Gibson on the stand justifies the inference that his testimony, if presented, would have been unfavorable to the prosecution. *Lincoln National Life Insurance Company v. Erickson*, 8 Cir., 42 F. (2d) 997; *Mammoth Oil Company v. United States*, 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137."

In *Interstate Circuit v. United States*, 306 U. S. 208, at pages 225, 226, the Court, in part, stated as follows:

> "The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham*, 153 U. S. 216, 225; . . ."

The above cases were cited in *United States v. Aluminum Co. of America*, 44 F. Supp. 97, at page 275:

> "As said with respect to a person having an attitude friendly to one side, such as Mr. Van Alstyne must be assumed to have had at least toward Aluminum, his silence would be 'a proper subject of comment'. *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 S. Ct. 349, 350, 40 L. Ed. 463. As also said, it would be 'permissible' to infer that he was not in position to deny what

had been ascribed to him (*Northern Railway Co. v. Page*, 274 U. S. 65, 74, 47 S. Ct. 491, 71 L. Ed. 929); it would be 'persuasive' that, if he had testified, what he said would have been unfavorable (*Interstate Circuit v. United States*, 306 U. S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610); and it would be fair argument for the other side. *United States v. Cotter*, 2 Cir., 60 F. (2d) 689, 692."

The dissenting opinion of Mr. Justice Black in *Stewart v. Southern Ry. Co.*, 315 U. S. 283, at page 289, is respectfully submitted, not with the thought that this Court ordinarily would be influenced by a dissenting opinion, but for the reason that the particular rule under inquiry is not discussed in the majority opinion in that case.

The action was one in tort based upon an alleged defective coupling on a railroad car. The language is as follows:

"Moreover, since there was a statutory duty not to continue using this particular pin lifter if it was defective, we can reasonably assume that the railroad's inspectors made some examination of it. Yet no inspector nor anyone else was called by the railroad to give testimony on the condition of the pin lifter immediately after the accident. Under these circumstances, reasonable jurors are not to be denied the right to make inferences which other reasonable people would make; that Stogner tried in the usual way to couple the cars; that his efforts were unsuccessful; and that he was therefore compelled to go between the cars to effect a coupling. And they could therefore have concluded that the pin lifter was defective. The jury's finding of this fact should not have been disturbed."

The rule is as applicable in criminal cases as it is in civil cases, both for the prosecutor as well as for the accused. *Wigmore On Evidence*, Volume II, paragraph 290.

In the case at bar, it must be remembered that the entire defense was an attack upon the testimony of the witnesses Edward William Kelly and Wesley Doores, each of whom testified that they, Shirley Doores and the appellant conceived and executed a conspiracy. The unlikelihood of their story, the lack of credibility attached to the witness Wesley Doores, and his instability as a witness constituted the entire defense in this case, and was carried into the argument by each of the counsel who addressed the jury for the appellant.

The testimony is uncontradicted that appellant and Shirley Doores lived together in a common law relationship; that they had occupied the home on Carlisle Avenue since September 1943; that they were more or less constantly together in Spokane and other places during that period. It cannot successfully be urged that Shirley Doores was in a closer relationship to the government than she was to her common law husband, the appellant. There was every reason for the government to be skeptical about calling her as a witness. She was called for one purpose only—to establish the fact that she was not the legal wife of appellant. During the interrogation and admonition by the Court as to her right not to testify and thereby incriminate herself, she indicated she

would not testify, (R. 362) even to the extent of answering the question as to whether she had ever been married to appellant. This was in the absence of the jury. When the trial resumed before the jury, the question was put to her, following instruction by the Court that she could claim her privilege in front of the jury, and surprisingly she answered the question by stating "no" when asked if she had ever been married to appellant.

If appellant was not a party to the conspiracy, as outlined by government witnesses Kelly and Wesley Doores in which they included appellant and Shirley Doores with themselves as co-conspirators, Shirley Doores by virtue of her common law relationship with appellant was more available to him than to the government. The reasonable expectation is that if Kelly and Wesley Doores were not telling the truth about the formation of the conspiracy to extort money from Dr. Teed, Shirley Doores was the one person in addition to appellant whose testimony might rebut that of the two government witnesses. Mr. Gleeson, one of appellant's attorneys, stated repeatedly during the admonition to Shirley Doores by the Court, that, "she might be a witness, that they had not yet decided whether she would be a witness." If Mr. Gleeson, in his dual role as attorney for appellant and Shirley Doores, felt influenced by his duty to Shirley Doores to instruct her not to testify to anything which might incriminate her, he could have instructed his client as to her rights, placed her on the stand and let her refuse to testify because of the dan-

ger of self-incrimination. His failure to do this left the inference that Shirley Doores would tell the truth and that the truth would be adverse to the appellant.

One convicted of a crime testifying as a witness, either for the government or for the defendant, was first passed upon in *United States v. Reid*, 12 How. 361 (1851). The competency of a co-defendant who has plead guilty was determined adversely to defendant's claim in *Benson v. United States*, 146 U. S. 325.

The two cases are fully discussed in *Rosen v. United States*, 245 U. S. 467. The language of the Court in that case is significant:

> "Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

In the above case one, Broder, was indicted with Rosen. He entered a plea of guilty, and was sentenced. He was later called as a witness for the government.

In *Funk v. United States*, 290 U. S. 371, the Court had before it the question of whether or not the wife of a defendant on trial for a criminal offense was a

competent witness in his behalf. In the course of its opinion the Court referred to the *Benson* and *Rosen* cases *Supra*, and traced the development of the rules of evidence disqualifying as witnesses persons having an interest in the subject matter. With reference to a co-defendant on trial it stated this question on page 377 of the opinion:

> "'. . . If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent?'"

Mr. Justice Sutherland states the modern adaptation of the rule to be as follows, page 380:

> "The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted."

See also, *Wigmore On Evidence*, Volume II, paragraphs 285, 286, 287, 288 and 290.

Appellant cites *Hopkins v. State*, 146 Pac. 917, as authority for the proposition that the government's comment on the failure of the defendant to introduce as witnesses in his behalf co-defendants not on trial constitutes reversible error. This is an Oklahoma case, and the ruling of the Court is based upon the statute of that state (5880, Revised Laws) to the effect that when two or more persons are included in the same indictment or information, and the Court is of the opinion that as to a particular defendant there is not sufficient evidence to put him on his defense, the Court must, before the evidence is closed, submit its opinion to the jury, and the jury acquit the defendant in order that said defendant may be compelled to be a witness for his co-defendant. The Prosecuting Attorney in his argument to the jury commented on the failure of a co-defendant to take the stand on behalf of the defendant, stating specifically: "They had a right to call him." The Court held, and we believe rightly, that the Prosecuting Attorney had misquoted the above Oklahoma statute in that the co-defendant had not been acquitted by the jury, and therefore could not be compelled to testify for the defendant on the ground that he was still a co-defendant and had an interest in the case, and could not be compelled to incriminate himself.

The Court did state in its opinion that: "Considering the doubtful character of the testimony against the defendant we think the remarks prejudicial."

We respectfully call the Court's attention to *Gor-*

man v. State, 92 Pac. (2d) 1086, at page 1096, a very recent Oklahoma case in which *Hopkins v. State, Supra*, was considered in the opinion, and which announces the general rule in Oklahoma against an attorney for the State commenting on failure of the defendant to produce testimony of a co-defendant as not legitimate argument, in which the Court in rendering its judgment stated:

> "Unless the case is close on the facts and this misconduct may have influenced the verdict, it is not necessarily reversible error."

Both *Duncan v. State*, 2 Pac. (2d) 285 and *Hancock v. State*, 241 Pac. 1108, cited by appellant are also Oklahoma cases and conform to the rule as above set forth.

The appellant also cites *Moyer v. United States*, 78 F. (2d) 624, a Ninth Circuit case, wherein it is stated that the rule should not be applied in the case of one who might be called as a witness who is a co-defendant and has entered a plea of guilty, and as to whom the sentence has not been imposed.

It is true this case standing by itself would appear to be supporting authority for contention of the appellant. As pointed out, however, very aptly by Judge Schwellenbach in his opinion of the Court, the weakness of the *Moyer case* is that it refers specifically to *Alford v. United States*, 282 U. S. 687 in connection with the statement of the rule as above set forth, stating specifically:

> "Of one in that position the Supreme Court in *Alford v. United States, Supra,* page 693, said: 'Nor is it material as the (Circuit) Court of Appeals (41 F (2d) 157) said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony *was affected by fear or favor growing out of his detention . . .*' "

Therefore, the reason the Court in the Moyer case had for excluding the rule in the case of unsentenced co-defendants was its belief that the testimony of such unsentenced co-defendants might be affected by fear or favor growing out of detention. That such a reason cannot exist in Judge Schwellenbach's Court, and particularly in the trial of this case is best said by Judge Schwellenbach in his opinion of the case (R. 23) wherein he announces the policy steadfastly maintained in his Court. The advice of the United States Attorney, or his recommendation, is not permitted either publicly or privately, and that the appellant's attorneys were cognizant of that rule by reason of their frequent appearances in the Court. As aptly pointed out by Judge Schwellenbach (R. 23):

> "They (appellant's attorneys) were entirely familiar with the rule. They and the defendant and Shirley Doores knew that she had nothing to fear and that she could expect no favors as a result of her testimony had she taken the stand."

It is also respectfully pointed out in the *Moyer*

case, *Supra*, that, as expressed by Judge Norcross in his opinion, page 630:

> "Where, as in this case, the only witness available who was not called was equally accessible to both the prosecution and the defendant on trial, the rule is that no unfavorable inference can be drawn against either the prosecution or the defense by reason of a failure to call such witness. *Egan v. United States*, 52 App. D. C. 384, 287 F. 958, 969; *Grunberg v. United States* (C. C. A.) 145 F. 81, 88; 16 C. J. 541; *Sacramento Suburban Fruit Lands Co. v. Boucher* (C. C. A.) 36 F. (2d) 912."

As hereinbefore pointed out that situation did not exist in this case.

It is respectfully submitted, therefore, that there can be no question that Shirley Doores was not only accessible to the appellant as a witness, but was peculiarly available to him as a witness against the government. It is further respectfully submitted that Shirley Doores was not accessible or available as a witness to the Government within the purview of the rule for reasons hereinbefore set out. Therefore, the general rule that comment may not be made by an attorney upon the fact that a witness equally available to both plaintiff and defendant did not testify in the other parties' behalf is not applicable here.

It is respectfully submitted that the evidence produced by the government against the appellant was strong and overwhelming in contrast to those cases where the above general rule has been applied and accepted, due primarily to the weak and insufficient evidence presented against the defendant.

ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERROR NO. 6

Appellant further alleges in Specification of Error No. 6 that the trial Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objections of appellant. From the reading of the instructions given prior to the additional instructions on conspiracy and circumstantial evidence, it is clear that the trial judge did not fully define the meaning of the term "overt acts". The instruction as originally given may well have caused the jurors to believe that it was necessary for the appellant to have performed personally or participated in one of the several overt acts. Such is not the law, and the additional instruction properly corrected the charge as initially given to the jury.

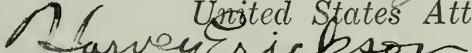
As to the additional instruction on circumstantial evidence, the initial instruction as given by the Court would likely have excluded all direct evidence of the existence of the conspiracy from their consideration. The additional instruction pointed out that the government was basing its case upon both direct and circumstantial evidence, and that both could be considered by the jurors. This additional instruction was right and proper in correcting an initial instruction which might have caused the jurors to limit their consideration to circumstantial evidence.

It is respectfully submitted that granting or re-

fusing to grant additional instructions is wholly within the discretion of the Court. Nothing is contained in the additional instructions which would tend to accentuate or give undue prominence to any particular phase of the instructions as a whole, and certainly none of the additional instructions serve to accentuate and emphasize the testimony of the defendants Kelly and Wesley Doores, as urged by the appellant.

It is respectfully submitted that the verdict of the jury and the judgment of the Court is in all respects sound and should be affirmed.

EDWARD M. CONNELLY,
United States Attorney



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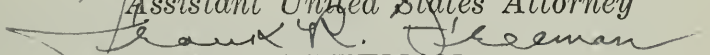

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